UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA – WESTERN DIVISION

AMERICAN ASSOCIATION OF POLITICAL CONSULTANTS, INC., **DEMOCRATIC PARTY OF OREGON, INC.,** **PUBLIC POLICY POLLING, LLC,** **TEA PARTY FORWARD PAC, and** **WASHINGTON STATE DEMOCRATIC CENTRAL COMMITTEE,** **Plaintiffs** **vs.** **LORETTA LYNCH, in her official capacity as Attorney General of the United States and** **FEDERAL COMMUNICATIONS COMMISSION, a federal agency,** **Defendants.**	)	**Civil Action No. 5:16-cv-00252 (JCD)**

PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT

Plaintiffs American Association of Political Consultants, Inc. ("AAPC"), Democratic Party of Oregon, Inc. ("DPO"), Public Policy Polling, LLC ("PPP"), Tea Party Forward PAC ("TPF"), and Washington State Democratic Central Committee ("WSDCC") (collectively "Plaintiffs") by and through counsel, respond to Loretta Lynch, in her official capacity as Attorney General of the United States, and the Federal Communications Commission ("FCC"), a federal agency (collectively "Defendants") and Defendants' Motion to Dismiss First Amended Complaint (Doc.

22)[1] and Memorandum in Support of Defendants' Motion to Dismiss (Doc. 23, "Memorandum") as set forth below.

[1] All references to "Doc. __" shall be to the docket/document number assigned to the document in the official court record.

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I. SUMMARY OF THE CASE

On May 12, 2016, Plaintiffs filed this lawsuit against Defendant Loretta Lynch, in her official capacity as Attorney General of the United States, for declaratory judgment as well as preliminary and permanent injunctions to restrain Defendant from acting under color of law to deprive Plaintiffs of rights secured to them by the First Amendment to the U.S. Constitution. *See* Doc. 1, ¶¶ 1-2. Specifically, Plaintiffs allege that the cell phone call ban is an unconstitutional violation of their First Amendment rights because it is content based and cannot withstand strict scrutiny. *Id*.

On July 15, 2016, Defendant Lynch filed her Motion to Dismiss Plaintiffs' Complaint for lack of subject-matter jurisdiction. *See* Doc. 15 and 16. Plaintiffs subsequently filed their First Amended Complaint on August 5, 2016, and added the FCC as a Defendant. *See* Doc. 18. In the First Amended Complaint, Plaintiffs alleged that 47 U.S.C. § 227(b)(1)(A)(iii) (hereinafter the "cell phone call ban") of the Telephone Consumer Protection Act ("TCPA") violates the First Amendment because it is a content-based restriction of Plaintiffs' fully-protected political speech and cannot withstand strict scrutiny. Doc. 18, ¶ 2. This case is a challenge to the cell phone call ban, only, based on the litany of content-based exemptions to it created by Congress and the FCC. Plaintiffs are not challenging the entirety of the TCPA, nor are they challenging those exemptions. *Id*. at ¶ 4. Plaintiffs have further alleged that the fact that Congress and the FCC continue to create content-based exemptions to the cell phone call ban supports Plaintiffs' argument that it is unconstitutional. The history of the FCC and Congress' ability and intent to continue to create content-based exemptions to the cell phone call ban demonstrates that it is unconstitutional. *Id*. at ¶ 3.

Defendants' Motion to Dismiss First Amended Complaint (Doc. 22) and Memorandum in Support of Defendants' Motion to Dismiss (Doc. 23) were filed on August 26, 2016. In their Memorandum, Defendants argue that 1) the district court lacks jurisdiction to consider Plaintiffs' suit because it is actually a challenge to FCC orders creating the content-based exemptions; and 2) Plaintiffs lack standing because the remedy for a challenge to regulatory exemptions, i.e. striking those exemptions, would not redress their alleged injury. *See* Doc. 22. As shown herein, Plaintiffs contend that both of these arguments mischaracterize Plaintiffs' case and neither has merit. *See infra* and Doc. 18.

II. STATEMENT OF FACTS

Plaintiffs are various political organizations and a bipartisan, nonprofit association of political professionals that make calls to registered voters on their cell phones to discuss political and governmental issues and to solicit political donations, and would make these calls to persons who did not provide prior express consent to them using an automatic telephone dialing system ("ATDS"), artificial or prerecorded voice but for the cell phone call ban and the potential for prosecution by the federal government, states, or private persons or classes of persons. Doc. 18, ¶¶ 8-12. As set forth above, Plaintiffs in their First Amended Complaint allege that the cell phone call ban of the TCPA violates the First Amendment because it is a content-based restriction of Plaintiffs' fully-protected political speech and cannot withstand strict scrutiny. *Id*. at ¶ 2. They challenge the cell phone call ban, only, based on the litany of content-based exemptions to it created by Congress and the FCC, and are not challenging the entirety of the TCPA, nor are they challenging those exemptions. *Id*. at ¶ 4. Plaintiffs have also alleged that the history and continuous creation by Congress and the FCC of content-based exemptions to the cell phone call ban supports Plaintiffs' argument that it is unconstitutional. *Id*. at ¶ 3.

Since 1992, the FCC and Congress have passed numerous exemptions to the cell phone call ban which apply based on the identity of the caller and/or the content of the exempted calls. *Id*. at ¶¶ 28-35. The wireless exemption, package delivery exemption, intermediary consent exemption, HIPAA exemption, bank and financial exemption, debt collection exemption and official federal government business exemption as referenced in the First Amended Complaint each favor commercial speech over the noncommercial political speech of Plaintiffs, and thus violate the constitutional rights of these political organizations. *See id*. at ¶¶ 28-50. As a result, and for the reasons more particularly alleged in the First Amended Complaint, Plaintiffs have alleged that the cell phone call ban is an impermissible content-based restriction on free speech and is underinclusive. *Id*. at ¶¶ 36-63. Plaintiffs seek, among other things, a preliminary and permanent injunction enjoining the enforcement of the cell phone call ban by Defendants, its agents and employees against these Plaintiffs, and others similarly situated, and a declaratory judgment pursuant to Fed. R. Civ. P. 57 and 28 U.S.C. § 2201 that the cell phone call ban on its face is unconstitutional as it violates the First Amendment to the U.S. Constitution. *Id*. at Prayer ¶¶ 1-3.

Defendants have filed a motion to dismiss and supporting memorandum arguing that 1) the district court lacks jurisdiction to consider Plaintiffs' suit because it is actually a challenge to FCC orders creating the content-based exemptions; and 2) Plaintiffs lack standing because the remedy for a challenge to regulatory exemptions, i.e. striking those exemptions, would not redress their alleged injury. *See* Doc. 22. As shown herein, Plaintiffs contend that both of these arguments mischaracterize Plaintiffs' case and neither has merit. *See infra* and Doc. 18.

III. ARGUMENT

A. The cell phone call ban violates the First Amendment.

The cell phone call ban is contrary to the protections afforded to political speech by the First Amendment. "[S]peech on 'matters of public concern' … is 'at the heart of the First Amendment's protection.'" *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-59 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978). The First Amendment reflects "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This is because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964). Consequently, "speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." *Connick v. Myers*, 461 U.S. 138, 145 (1983) (internal quotation marks omitted).

Nor would striking the regulatory and statutory exemptions properly redress Plaintiffs' injury as the FCC and Congress are empowered to create new exemptions. *See City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994) (the Supreme Court struck down ordinance that prohibited residences from erecting certain signs but exempted commercial entities, churches, and nonprofit organizations as a content-based restriction on speech that violated the First Amendment). The Court noted that "[e]xemptions from an otherwise legitimate regulation of a medium of speech may be noteworthy for a reason quite apart from the risks of viewpoint and content discrimination: They may diminish the credibility of the government's rationale for restricting speech in the first place." *Id*. at 52. *See also Carey* v. *Brown*, 447 U.S. 455, 459-71 (1980) (the Supreme Court struck down state law that forbade certain kinds of picketing but exempted labor picketing as it discriminated between lawful and unlawful conduct based upon the content of the communication. Notably, the Court struck the statute, not the exemption to the statute, as unconstitutional).

Permitting more speech, rather than less, is preferable as part of the marketplace of ideas where freedom of expression encourages the competition of ideas. *See Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, O., dissenting) ("the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."); *U.S. v. Rumely*, 345 U.S. 41, 56 (1953) ("Like the publishers of newspapers, magazines, or books, this publisher bids for the minds of men in the market place of ideas."); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

B. Plaintiffs challenge the cell phone call ban, a provision of the TCPA.

Defendants' Memorandum rests on the argument that the district court lacks jurisdiction, characterizing Plaintiffs' challenge not as a challenge to a provision of the TCPA, but to the regulatory exemptions created by FCC orders.[2] That characterization is false: Plaintiffs' lawsuit challenges a provision of the TCPA:

> the ban on certain calls to cell phones in the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227(b)(1)(A)(iii) (hereinafter the "cell phone call ban"), is an unconstitutional violation of their First Amendment rights because it is content-based and cannot withstand strict scrutiny.

Doc. 18, ¶ 2.

Plaintiffs reiterate throughout their First Amended Complaint that "[t]his lawsuit is a challenge to a federal statute" and it is "not a challenge to FCC orders or regulations promulgated under that statute." *Id.* at ¶ 4. Based on an apparent recognition of this fact, alternatively,

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[2] *See* Doc. 23, p. 4, n.2. To be clear, Plaintiffs do not dispute that the court of appeals has exclusive jurisdiction to determine the validity of all final orders of the FCC. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342(1), but deny that they are challenging any FCC orders, and thus deny that this suit invokes the Hobbs Act.

Defendants contend that "[a]lthough Plaintiffs' primary purpose in citing to FCC orders in their Complaint may be to argue that the TCPA writ large is unconstitutional, the fact that those orders form the basis for their constitutional argument is sufficient to invoke the jurisdiction of the court of appeals." Doc. 23, p. 5. Defendants do not cite any law for this proposition, nor could they. Moreover, Plaintiffs are not challenging the TCPA as a whole, but the cell phone call ban. *See* Doc. 18, ¶ 2. Nevertheless, elsewhere in their Memorandum, Defendants contend that "Plaintiffs make no argument that the statute itself is otherwise unconstitutional" so the "'practical effect' of a ruling in Plaintiffs' favor would be to invalidate the FCC orders alone" and the district court would therefore lack jurisdiction. Doc. 23, p. 6. This statement contradicts not only Plaintiffs' First Amended Complaint, but Defendants' argument cited above and its further admission in their Memorandum that "[Plaintiffs] are left with their argument that the statute is unconstitutional because the 2015 amendment, exempting calls made to collect debts owed to or guaranteed by the Federal Government, renders it content-based." *Id.* at p. 7.

Plaintiffs have, in fact, argued that the cell phone call ban is an unconstitutional restriction, applicable or not based on the identity of the speaker and the content of the speech. The cell phone call ban restricts Plaintiffs' fully-protected political speech while it otherwise permits certain types of commercial speech. *See* Doc. 18, ¶¶ 36-50.

Plaintiffs also argue that the cell phone call ban is unconstitutional as an underinclusive statute because it discriminates against some speakers [Plaintiffs] but not others without a legitimate 'neutral justification' for doing so." *Nat'l Fed'n of the Blind v. F.T.C.*, 420 F.3d 331, 345 (4th Cir. 2005) ("Even when the government has a compelling interest for restricting speech, it may not seek to further that interest by creating arbitrary distinctions among speakers that bear no 'reasonable fit' to the interest at hand."). *Id.*

The FCC believes it has the power to make content-based exemptions to the cell phone call ban.[3] Congress also believes it has the same ability and if a statutory content-based exemption was struck down, Congress could simply pass a new law recreating it. The fact that Congress and the FCC continue to create content-based exemptions to the cell phone call ban, including the 2015 amendment to the TCPA that exempts calls "made solely to collect a debt owed to or guaranteed by the United States"[4], leads to the conclusion that the cell phone call ban is unconstitutional.

Defendants' reliance on *Mais v. Gulf Coast Collection Bureau, Inc.*, 768 F.3d 1110, 1119 (11th Cir. 2014) is inapposite. The plaintiff in *Mais* filed a claim in federal district court against a medical provider and its debt collection agent for making prerecorded or ATDS calls to his cell phone without prior express consent in violation of the TCPA. *Id*. at 1113. The defendant argued that the calls fell within a statutory exception for "prior express consent," as interpreted in a 2008 declaratory ruling from the FCC. *Id*. Because the plaintiff's claim fell "squarely within the scope of the FCC order, which covers medical debts" and the district court held that the "FCC's interpretation was inconsistent with the language of the TCPA, the *Mais* court appropriately held that the district court had no authority to consider the validity of the 2008 FCC ruling. *Id.*

In this case, there is no request by Plaintiffs to have this Court consider any of the FCC rulings referenced in Plaintiffs' First Amended Complaint, and a review of those rulings makes clear that they are completely unrelated to the calls at issue in this case, and Plaintiffs would have no standing before the FCC to challenge any of those rulings. *See* Doc. 18, ¶¶ 29-34. The *Mais* court did discuss the "practical effect" that a case would have on an FCC ruling, 768 F. 3d at 1120, and thus Defendants here expressly argue that the "'practical effect' of a ruling in Plaintiffs' favor would be to invalidate the FCC orders alone, as Plaintiffs make no argument that the statute itself is unconstitutional." Doc. 23, p. 6. As Plaintiffs are arguing that a provision of the TCPA itself—the cell phone call ban—is unconstitutional, Defendants argument necessarily fails. Without directly stating it, Defendants want the Court to find that the Hobbs Act, 28 U.S.C. § 2342, is applicable in any challenge of a statute, if the statute has been interpreted by the FCC at some point, because the constitutional challenge would necessarily make rulings interpreting the statute of no force and effect. Neither the *Mais* case nor any other case cited by Defendants support this position, and it is undisputed that this Court has jurisdiction generally to assess the constitutionality of a statute or a provision thereof. *See* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

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[3] The TCPA has given the FCC the authority to "prescribe regulations to implement the requirements of this subsection …." 47 U.S.C. § 227 (b)(2).

[4] TCPA, Pub. L. No. 114-74, § 301(a) 129 Stat. 588 (2015) (amending 47 U.S.C. § 227(b)(1)(A)(iii); 47 C.F.R. § 64.1200(a)(1)(iii)) (hereinafter referred to as the "debt collection exemption").

The decision and rationale of *U.S. v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 460 (8th Cir. 2000), a case cited by Defendants, demonstrates why Defendants' reliance on the Hobbs Act is erroneous. In that case, the government brought an in rem forfeiture action to seize radio equipment used by the plaintiff, an individual "microbroadcaster" who operated a radio station without a FCC license. In defending against the claim, the plaintiff asserted affirmative defenses including that FCC regulations barring new licenses to microbroadcasters violated the First Amendment and the Communications Act of 1934. *Id.* As noted specifically by the Court, the plaintiff "did not challenge the constitutionality of the Communications Act itself." *Id.* As Defendants do here, the government relied on the Hobbs Act and the Federal Communications Act, 47 U.S.C. § 402(a), but unlike that plaintiff, Plaintiffs here are in fact challenging the constitutionality of a provision of the statute, and are not challenging any order or ruling of the

FCC. The *Any & All Radio Station Transmission Equip.* court summarized the statutory scheme of the above two statutes, stating:

> The statute provides: “Any proceeding to enjoin, set aside, annul, or suspend any order of the Commission … shall be brought as provided by and in the manner prescribed in chapter 158 of Title 28.” 47 U.S.C. § 402(a). The cross-referenced statute states: “The court of appeals … has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of (1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47.” 28 U.S.C. § 2342.

207 F.3d at 463. In analyzing the statutory scheme, however, the Court noted:

> The statutory scheme makes sense (1) to ensure review based on an administrative record made before the agency charged with implementation of the statute; (2) to ensure uniformity of decision making because of uniform fact finding made by the agency; (3) to bring to bear the agency's expertise in engineering and other technical questions. If Fried had no way of obtaining judicial review of the regulations his case might be different. See Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 212-13 (1994). But he could have obtained review by applying for a license and asking for a waiver of the regulations; rejection of his request would have permitted appeal to the circuit.

Id. In this case, however, there is nothing for Plaintiffs to put before the FCC in the way of an administrative record, there is no fact finding for an agency to make as the relief sought here has nothing to do with decisions made by the agency, and the FCC has no expertise and there are no technical questions for the FCC to consider, and thus the factors supporting the statutory scheme do not exist. More directly, the purpose of this proceeding is not “to enjoin, set aside, annul or suspend any order of the Commission” and thus jurisdiction does not lie in the court of appeals. *See* 47 U.S.C. § 402(a); 28 U.S.C. § 2342. Moreover, unlike the option that the Court said was available to the plaintiff in *Any & All Radio Station Transmission Equip.*, Plaintiffs do not have the option of addressing the exemptions with the FCC as referenced in the First Amended Complaint.

Fitzhenry v. Indep. Order of Foresters, No. 2:14-CV-3690, 2015 U.S. Dist. LEXIS 76750, *6-7 (D.S.C. June 15, 2015), relied upon by Defendants, also supports Plaintiffs' argument that referencing an FCC order does not invoke the jurisdiction of the court of appeals under the Hobbs Act. In *Fitzhenry*, the plaintiff argued that "the FCC has been clear that if a tax exempt nonprofit is engaging in commercial pre-recorded telemarketing, it can be held liable." *Id*. at *6. While the defendant contested that interpretation, the district court noted that:

> Fitzhenry does not argue that the court should invalidate the nonprofit exemption. Such an argument would raise serious issues under the Hobbs Act, which grants the courts of appeals the "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of … all final orders of the [FCC]". 28 U.S.C. § 2342(1); 47 U.S.C. § 402.

Id. at n.3. Similar to the reasoning in *Fitzhenry*, if Plaintiffs had argued to invalidate final orders of the FCC, the jurisdiction of the court of appeals would be invoked. Plaintiffs, however, have not brought this proceeding to invalidate any FCC final order.

The other cases Defendants cite in support of their argument are also distinguishable. *See Self v. Bellsouth Mobility, Inc.*, 700 F.3d 453, 461-62 (11th Cir. 2012) (finding that the district court correctly concluded it did not have jurisdiction where in order to grant the relief sought it would have to contradict two previously issued FCC orders); *Am. Bird Conservancy v. FCC*, 545 F.3d 1190, 1193-94 (9th Cir. 2008) (court found that the district court did not have jurisdiction after defendants challenged that the FCC did not comply with its statutory obligation under the Endangered Species Act, despite the attempt to frame the case as a 'failure to act,' where the court found that seven FCC approvals of licenses for towers were being directly challenged); *Murphy v. DCI Biologicals Orlando, LLC,* 797 F.3d 1302, 1307 (11th Cir. 2015) (finding that the district court rightly refused to consider the TCPA case where the plaintiff directly challenged the FCC order); *Morse v. Allied Interstate, LLC,* 65 F.Supp.3d 407 (M.D. Pa. 2014) (holding that where the defendant was asking the court to disregard the interpretation of two FCC orders, its defense was subject to the Hobbs Act); *Compare IMHOFF Inv., L.L.C. v. Alfoccino, Inc.*, 792 F.3d 627, 637 (6th Cir. 2015) (noting that where the FCC's reasoning in a letter brief was questioned, there was no direct challenge to the legitimacy of FCC definitions, and thus the Hobbs Act was not applied); *Physicians Healthsource, Inc. v. Stryker Sales Corp*., No. 1:12-CV-0729, 2015 U.S. Dist. LEXIS 178592, *4-5 (W.D. Mich. Feb. 26, 2015) (refusing to apply the Hobbs Act and distinguishing between "facial" and "as applied" challenges of a final FCC order, and noting that the outcome of the case did "not depend on any final determination made by the FCC.").

Despite Defendants' mischaracterizations to the contrary, Plaintiffs are not trying to elude the jurisdiction of the court of appeals by artful pleading and are not challenging the FCC rulings that obviously do not apply to them. Rather, as clearly stated in the First Amended Complaint, Plaintiffs are challenging the constitutionality of the cell phone call ban. This Court has jurisdiction to preside over this case as Plaintiffs are challenging the constitutionality of a provision of the TCPA itself. *See* 28 U.S.C. § 1331.

C. Plaintiffs satisfy the standing requirements as finding the cell phone call ban unconstitutional as a violation of Plaintiffs' First Amendment rights would redress their injury.

In their Memorandum, Defendants appropriately set forth the standing standard for plaintiffs, including organizational plaintiffs, as enunciated by the U.S. Supreme Court, as well as by the Fourth Circuit in *Doe v. Va. Dep't of State Police*, 713 F.3d 745, 753 (4th Cir. 2013) and *White Tail Park v. Stroube*, 413 F. 3d 451, 458 (4th Cir. 2005)[5]. *See* Doc. 23, pp. 6-7. Defendants

[5] See also *Equity in Athletics, Inc. v. Dep't of Educ*., 639 F.3d 91, 100 (4th Cir. 2011) ("Where, as here, the plaintiff is an organization bringing suit on behalf of its members, it must satisfy three requirements to secure organizational standing: (1) that its members would have standing to sue as individuals; (2) that the interests it seeks to protect are germane to the organization's purpose; and (3) that the suit does not require the participation of individual members. *Hunt v. Washington State Apple Advertising Comm'n,* 432 U.S. 333, 343 (1977). Individual members of the organization must be able to show that (1) they suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be

do not argue, nor could they, that Plaintiffs have not suffered an actual or threatened injured by their inability to make ATDS, or artificial or prerecorded voice calls as a result of the cell phone call ban as Plaintiffs have averred that they "would make these calls to persons who did not provide prior express consent to it using an ATDS, artificial or prerecorded voice but for the cell phone call ban and the potential for prosecution by the federal government, states, or private persons or classes of persons." *See* Doc. 18, ¶¶ 8-12 and Declarations at Doc. 18-2 to 18-6; *see also Doe*, 713 F.3d at 753. Similarly, there can be no issue that Plaintiffs' injury is traceable to the cell phone call ban. *See id.* Rather, Defendants allege Plaintiffs lack standing because they cannot show that any injury they have suffered would be redressed by a judgment in their favor. Doc. 23, p. 7; *see also Doe, supra* at 753. This argument once again relies on the false assumption that Plaintiffs are challenging the regulatory exemptions to the cell phone call ban and not the cell phone call ban itself.

Under Article III of the U.S. Constitution, "[a]n injury is redressable if it is 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.'" *Id.* at 755 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). "No explicit guarantee of redress to a plaintiff is required to demonstrate a plaintiff's standing." *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 100 (4th Cir. 2011). In assessing standing, the *Equity in Athletics, Inc.*, the court noted:

> This court assumes the merits of a dispute will be resolved in favor of the party invoking our jurisdiction in assessing standing and, at the pleading stage, "presumes that general allegations embrace those specific facts that are necessary to support the claim." Lujan v. National Wildlife Federation, 497 U.S. 871, 889, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990); *see also* Parker v. District of Columbia, 478 F.3d 370, 377 (D.C.Cir.2007), *aff'd by* District of Columbia v. Heller, 554 U.S. 570, 128 S.Ct. 2783, 171 L.Ed.2d 637 (2008) ("The Supreme Court has made clear

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redressed by a favorable decision. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992); *Miller v. Brown,* 462 F.3d 312, 316 (4th Cir.2006)").

> that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim.").

Id. at 99. Therefore, the arguments put forth by Defendants in their Memorandum that the Court will ultimately rule in their favor because the TCPA has been upheld previously, or based on Defendants' erroneous contention that Plaintiffs are attacking the FCC orders or debt collection exemption, are irrelevant and do not overcome the assumption that the merits of the dispute will be resolved in the favor of Plaintiffs. Moreover, as will be shown on a hearing on the merits, the cell phone call ban as applied is unconstitutional as the First Amendment prohibits discrimination as to the content of speech or the identity of the speaker. *Reed v. Town of Gilbert,* ___ U.S. ___, 135 S. Ct. 2218, 2227 (2015) ("Government regulation of speech is content-based if a law applies to particular speech because of the topic discussed or the idea or message expressed.").

The cell phone call ban places a significant burden on Plaintiffs as they are required to obtain prior express consent to make ATDS, or artificial or prerecorded voice calls to cell phones, while the cell phone call ban permits other speakers, including commercial debt collectors, to disseminate commercial speech without regard to the cell phone call ban. The cell phone call ban severely hinders Plaintiffs' attempts to reach citizens and engage them in political discourse. Finding the cell phone call ban unconstitutional will allow Plaintiffs to more easily engage with constituents, which parallels the First Amendment's "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open," and has "consistently commented on the central importance of protecting speech on public issues." *Boos v. Barry,* 485 U.S. 312, 318 (1998). Therefore, Plaintiffs satisfy the Article III standing requirement as determining that the cell phone call ban is unconstitutional would redress their injury.

IV. CONCLUSION

The district court has jurisdiction in this case as Plaintiffs are challenging the constitutionality of cell phone call ban, a provision of the TCPA, and are not seeking by this proceeding to enjoin, set aside, annul, or suspend any order of the FCC.

Plaintiffs also satisfy Article III's standing requirement as they have sufficiently alleged that they have (1) suffered an actual or threatened injury that is concrete, particularized, and not conjectural; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by redress their injury. For the foregoing reasons, this Court should deny Defendants' Motion to Dismiss First Amended Complaint.

Dated: September 23, 2016.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on the following parties via the Court's CM/ECF electronic filing system, or if the party does not participate in Notice of Electronic Filing, via U.S. mail, postage prepaid, on this 23rd day of September 2016, to:

Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Civil Process Clerk
Office of the United States Attorney
Eastern District of North Carolina
310 New Bern Avenue
Federal Building, Suite 800
Raleigh, North Carolina 27601-1461

/s/ William E. Raney
William E. Raney